Nos. 87-253, 87-431, 87-462, 87-775

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

OTIS R. BOWEN, Secretary of Health & Human Services,

Appellant,

v.

CHAN KENDRICK, *et al.*,

Appellees.

CHAN KENDRICK, *et al.*,

Cross-Appellants,

v.

OTIS R. BOWEN, Secretary of Health & Human Services, and SAMMIE J. BRADLEY, *et al.*,

Cross-Appellees.

UNITED FAMILIES OF AMERICA,

Appellant,

v.

CHAN KENDRICK, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF FOR THE CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS, AND CONCERNED WOMEN FOR AMERICA, AMICI CURIAE

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

The Catholic League for Religious and Civil Rights (hereinafter League) and Concerned Women for America (hereinafter CWA), pursuant to Rules 36.3 and 43 of the Rules of this Court, respectfully move for leave to file the appended brief amici curiae in support of Otis R. Bowen, Secretary of Health and Human Services and United Families of America, *et al.*, in these cases.

The League is a voluntary non-profit organization, national in scope, dedicated to the right to religious freedom and the right to life of all born or unborn. In pursuit of its interest in religious freedom, the League is especially concerned with ensuring that the Establishment Clause is not interpreted in manners which discriminatorily preclude religious entities from participation in programs ostensibly open to all. To this end the League has filed amicus curiae briefs with this Court in such cases as *Aguilar v. Felton*, 473 U.S. 402 (1985), in which it urged that the Establishment Clause not be used as a bar to government provision of remedial services to students in religiously oriented schools.

CWA is a national, non-profit women's organization based in Washington, D.C. CWA's purpose is to preserve, protect and promote traditional and Judeo-Christian values through education, legal defense, humanitarian aid to refugees and legislative programs. CWA is also extremely concerned with government programs which deprive individuals and institutions of benefits because of their religious motivations or affiliations. This concern was most directly expressed in *Witters v. Washington Department of Services for the Blind*, 106 S. Ct. 748 (1986). In that case, CWA attorneys represented an individual before this Court who had been improperly deprived of governmental benefits because of his choice of religious education.

The League and CWA will address the Establishment Clause questions in this case from a perspective emphasizing the Establishment Clause's policy of preservation of free-

dom of conscience through elimination of orthodoxy on religious matters. The brief will also outline the Establishment Clause difficulties resulting from judicial elimination of funding for religious groups. Although the Establishment Clause issues will certainly be addressed by all parties, it is unlikely that the parties will address these issues from the policy perspectives which the Catholic League and CWA will furnish. Thus, a brief from the Catholic League and CWA will be useful to the Court in its disposition of this case.

The League and CWA have applied to counsels of records for all parties for their consent to file this brief. However, when this brief went to the printer, consent for filing a joint brief had not yet been received. In the relatively likely event consent letters are received, they will be filed with the Clerk of this Court and this motion will be withdrawn.

For the foregoing reasons, the League and CWA move for leave to file the appended brief amici curiae.

Respectfully submitted,

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BRIEF FOR THE CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS AND CONCERNED WOMEN FOR AMERICA, AMICI CURIAE

INTERESTS OF AMICI CURIAE

The interests of The Catholic League for Religious and Civil Rights and Concerned Women for America, as amici curiae are set forth in the Motion for Leave to File Brief Amici Curiae.

SUMMARY OF ARGUMENT

The district court's decision in this case is a classic illustration of this Court's observation that: "[F]ocus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause." *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984). By focussing only upon religiously oriented grant recipients under a single government program addressing adolescent sexuality and by not considering Establishment Clause difficulties raised by prohibiting these groups from funding, the district court's decision failed to implement the important policies underlying the Establishment Clause.

Legal tests developed under the Establishment Clause are useful only insofar as they implement the policies underlying the Establishment Clause. The Establishment Clause's purpose is to prohibit conduct which "in reality . . . establishes a religion or religious faith, or tends to do so." *Lynch*, 465 U.S. at 678 *citing Walz v. Tax Commission*, 397 U.S. 664, 669 (1970). This purpose proceeds from the policy of preserving "the individual's freedom of conscience [which is] the central liberty which unifies the various clauses in the First Amendment." *Wallace v. Jaffree*, 472 U.S. 38, 50 (1985). In the context of the Establishment Clause this policy is carried out by ensuring that "no official, high or petty, can prescribe what shall be called orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein." *Wallace*, 472 U.S. at 55 *quoting Board of Education v. Barnette*, 319 U.S. 624, 642 (1943).

Proper interpretation of these Establishment Clause policies requires that a court appropriately frame the issue and focus its inquiry. *See Lynch*, 465 U.S. at 680. Instead of examining the totality of government action in the area of adolescent sexuality, the district court improperly narrowed its analysis to the fact that the Adolescent Family Life Act (AFLA) funded "religious organizations." This focus failed to implement the Establishment Clause in light of its underlying policy of insuring individual freedom of conscience for four basic reasons. First, the district court improperly considered the AFLA in a "vacuum" and did not look at other governmental conduct in the area of adolescent sexuality which could legitimately be characterized as hostile to religion. Second, the district court improperly considered only the funding of religious organizations under the AFLA instead of examining all funding under that statute. *See Witters v. Washington Department of Services for the Blind*, 106 S. Ct. 748, 754-755 (1986) (Powell, J., concurring) (In determining Establishment Clause questions the court must look at nature and consequences of program as a whole rather than characteristics of particular funding recipients). Third, and most significantly, the district court failed to grasp the serious Establishment Clause difficulties resulting from *barring* theistically oriented groups from funding. Such a bar inhibits religion and individual freedom of conscience by forcing theistically oriented groups to shed religious affiliations or motivations if they are to take part in programs ostensibly open to all. Finally, the district court's order that religious groups be forbidden from funding under the AFLA aggravates, rather than cures, Establishment Clause difficulties by effectively establishing a non-theistic orthodoxy on questions of religious significance.

Since the district court's analysis failed to implement the Establishment Clause in the spirit of its underlying policy of protecting individual freedom of conscience, an alternative approach must be taken. Two such approaches would appear available.

The first would be a determination by this Court to take a generally more relaxed judicial approach to this case and other Establishment Clause cases. Building upon foundations

laid in such cases as *Mueller v. Allen*, 463 U.S. 388 (1983) and *Witters v. Washington Department of Services for the Blind*, 106 S. Ct. 748 (1986), this Court would uphold government funded programs which are open to all irrespective of religious affiliations or belief. Under such a construction Establishment Clause policies would be implemented because no individual or institution would be required to alter religious affiliations or beliefs to participate in a program. Further, governmentally supported orthodoxy would be prevented because permitting a broad variety of groups to be funded would allow a diversity of perspectives to be furnished which would be unavailable if religious groups were the exclusive entities funded, or as the district court decreed, excluded from funding entirely.

A second alternative approach would be a rigorous effort to ensure that government not establish an orthodoxy on religiously significant questions of adolescent sexuality. However, the Court must be prepared to face the fact that such an approach will require the elimination of *all* governmentally financed programs in the area of adolescent sexuality, not merely the prohibition of funding of religious groups under the AFLA or even the invalidation of the entire AFLA. However, the insulation of the religiously significant area of adolescent sexuality from government influence which would result from elimination of government funding for all adolescent sexuality programs would certainly implement the Establishment Clause. Governmentally supported orthodoxy would be eliminated because all decisions to fund groups in this area would become individual decisions of conscience rather than governmental actions.

ARGUMENT

I.

AN ESTABLISHMENT CLAUSE DECISION MUST IMPLEMENT THE POLICY OF FREEDOM OF CONSCIENCE THROUGH ELIMINATION OF ORTHODOXY ON RELIGIOUS MATTERS.

As the district court's decision demonstrates, Establishment Clause analysis often utilizes multi-faceted tests designed to gauge the conformity of government action to constitutional mandates. However, any Establishment Clause test or analysis is useful only insofar as it provides a means to implement the policies which underlie this constitutional protection. *See Lynch v. Donnelly*, 465 U.S. 668, 678 (1984) ("[T]he Court has scrutinized challenged legislation . . . to determine whether, in reality, it establishes a religion or religious faith, or tends to do so . . . The Establishment Clause . . . is not a precise, detailed provision in a legal code capable of ready application. [Its] purpose . . . 'was to state an objective not to write a statute.' ") (citations omitted). Thus, inquiry in this case must begin with an examination of the policies upon which the Establishment Clause is founded.

The Establishment Clause's purpose is prohibiting conduct which, "in reality, . . . establishes a religion or religious faith, or tends to do so." *Lynch*, 465 U.S. at 678 *citing Walz v. Tax Commission*, 397 U.S. 664, 669 (1970). This purpose proceeds from the policy which unifies the entire First Amendment. In *Wallace v. Jaffree*, 472 U.S. 38, 50 (1985), this Court explained that "the individual's freedom of conscience [is] the central liberty which unifies the various clauses in the First Amendment." (footnote omitted). Accordingly, any governmental action which furthers this central liberty implements Establishment Clause interests, while any governmental action impeding this liberty is suspect. Thus, legal tests implementing the Establishment Clause are properly employed only if their application advances the central constitutional liberty of preserving the individual's freedom of conscience.

In the Establishment Clause area the policy of individual freedom of conscience specifically requires that "no official, high or petty, can prescribe what shall be called orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Wallace*, 472 U.S. at 55 *quoting Board of Education v.*

Barnette, 319 U.S. 624, 642 (1943). Thus, the Establishment Clause, read in light of its underlying policy of protecting freedom of conscience, prohibits government from favoring or disfavoring religion in the course of its actions. Indeed, one prong of the Establishment Clause test formulated in *Lemon v. Kurtzmann*, 403 U.S. 602, 612 (1970) specifically commands that a government action's principal or primary effect be one that neither advances nor inhibits religion.

As this discussion makes clear, the Establishment Clause is a limit on governmental action, not on the action of religious institutions. Thus, proper Establishment Clause analysis must focus upon whether *government* action tends to establish a prohibited orthodoxy on questions of religious importance. Instead of carefully examining the nature of the government action in this case, the district court's analysis was largely an exploration of the religious affiliations or motivations of certain funding recipients. While this was an interesting exercise, it did not properly address the central concerns underlying the Establishment Clause. *See Witters v. Washington Department of Services for the Blind*, 106 S. Ct., 748, *754-755* (1986) (Powell, J., concurring) (In determining Establishment Clause questions a court must look at nature and consequences of governmental program as a whole rather than characteristics of particular funding recipients).

II.

THE DISTRICT COURT'S ELIMINATION OF FUNDING FOR RELIGIOUS ORIENTED INSTITUTIONS FAILS TO IMPLEMENT THE ESTABLISHMENT CLAUSE AND ITS UNDERLYING POLICY.

An examination of this Court's decision in *Lynch v. Donnelly*, 465 U.S. 668, 679-680 (1984), reveals the shortcomings in the district court's Establishment Clause analysis. In *Lynch* this Court recognized that Establishment Clause cases often turn upon the manner in which a court frames the issue and focuses its inquiry. When a court concentrates only upon government funding of a particular religious group, an Establishment Clause violation may seem clear. However, when a court considers every law addressing the subject in question, the character of every institution funded and the effect of excluding a group from funding solely on a religious basis, the Establishment Clause question becomes much more difficult. As the *Lynch* Court succinctly stated: "[F]ocus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause." 465 U.S. at 680. Put another way, a statute's religious effect may appear "direct and immediate" when only its religious components are considered, but will prove "remote and incidental" when the court focuses more broadly, and more fairly, upon the totality of governmental action pertaining to an area of concern. The district court's examination of the Establishment Clause issue is a textbook example of the error which can result when a court focuses only upon the "religious" component of challenged legislation.

The district court's analysis can fairly be characterized as one focusing almost exclusively upon the fact that the Adolescent Family Life Act funded "religious organizations." Such a limited focus fails to properly gauge the statute's conformity with the Establishment Clause, especially when the Clause is read in light of its underlying policy of ensuring individual freedom of conscience in religious matters. Four major problems resulting from the district court's inappropriately narrow analysis are immediately apparent.

First, the district court improperly considered the Adolescent Family Life Act (AFLA) in a "vacuum." Instead of examining the AFLA in the broad context of government funding of all groups which address teenage sexuality, the district court isolated this program from others addressing this subject matter. Assuming that the district court was correct in its conclusion that many find questions regarding sexuality, contraception and abortion religiously significant,[1]

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[1] *See Kendrick v. Bowen*, 657 F.Supp. 1547, 1563 (D.D.C. 1987).

it should have examined the totality of government action in these fields. An examination of all government programs in these areas would likely have found a much greater level of government funding directed toward groups and projects whose positions on these issues are hostile to many traditional Judeo-Christian beliefs. But, none of these programs (i.e., Title X) was considered or mentioned by the district court. By focusing only upon the AFLA, government subsidization of traditional theistic religions appeared to exist in subject areas in which government funding has likely been provided predominantly to groups which strongly oppose the moral concepts of traditional theistic religion. If anything, funding of religious entities under the AFLA may have alleviated Establishment Clause problems in the areas of sexuality, contraception and abortion by lessening the degree to which government inhibited religion through its support of groups whose beliefs on these religiously significant issues are contrary to those of many of the religious organizations who received grants under the AFLA. Indeed, an examination of the Establishment Clause, in light of its underlying policy of preventing government supported orthodoxy on religious important issues, could well require the inclusion of both theistic and non-theistic recipients in programs addressing these issues.

Second, the district court's improperly limited focus was also apparent in its consideration of funding patterns under the AFLA. Just as the court considered the AFLA in isolation from other governmentally financed sexuality programs, it also improperly considered the funding of theistic groups in isolation from the overall pattern of funding under the AFLA. *See Witters v. Washington Department of Services for the Blind*, 106 S. Ct. 748, 754-755 (1986) (Powell, J., concurring) (In determining Establishment Clause questions court must look at nature and consequences of governmental program as a whole rather than characteristics of particular funding recipients). Even when judicial examination is confined to the AFLA, a full consideration of funding patterns would likely have found significant funding for groups which

do not concur with religiously oriented positions on sexually related issues.

However, the most significant shortcoming in the district court's analysis was its total failure to consider the Establishment Clause problems raised by a systematic exclusion of religiously oriented groups from government funding under the AFLA. Because the court focussed solely upon the constitutional implications of *funding* theistic groups, it failed to comprehend the serious Establishment Clause difficulties resulting from *barring* such groups from funding. Such a bar forces theistically oriented groups to shed religion affiliations or motivations if they are to take part in programs ostensibly open to all. This outcome inhibits religion, severely limits the funding of diverse viewpoints and promotes a state orthodoxy on the issues of sexuality and pregnancy which excludes religion. Such a result is directly contrary to the central Establishment Clause policy of preserving freedom of conscience through the prevention of government orthodoxy on religious issues. While straining to find the "splinter" of possible religious establishment through funding theistic groups under the AFLA, the district court was blind to the "plank" of the violation of central Establishment Clause policies which would result from the exclusion from funding of these same groups. Cf. Matthew 7:3.

The final major difficulty with the district court's analysis is closely related. The district court's remedy of eliminating theistically oriented groups from funding under the AFLA does not solve the Establishment Clause difficulties which the Court finds present in the AFLA. Instead, this remedy worsens the statute's Establishment Clause difficulties. Not only is governmentally subsidized teaching on supposedly religiously charged topics permitted to continue, but governmentally supported orthodoxy is furthered by the apparent permission of only a non-religious approach to issues thought to be inherently religious. This type of judicial attempt to develop a non-religious orthodoxy on issues of religious significance presents the same difficulties which inhere in any governmental pressure toward orthodoxy in such matters. As this Court noted in *Barnette:*

> As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite and embrace. Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity down to the fast failing efforts of our present totalitarian enemies. Those who begin coercive elimination of dissent soon find themselves exterminating dissentors. Compulsory unification of opinion achieves only the unanimity of the graveyard.

Barnette, 319 U.S. at 641.

These observations preceded the *Barnette* Court's landmark observation, which this Court repeated recently in *Wallace v. Jaffree:* "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Wallace v. Jaffree*, 472 U.S. 38, 55 (1985) *quoting Barnette*, 319 U.S. at 641. Unfortunately, the district court's attempt to screen out religion aggravates the very Establishment Clause difficulties it is supposed to eliminate.[2]

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[2] These Establishment Clause difficulties are in addition to the serious Due Process problems which result from the exclusion of theistic groups from participation in programs in which all other groups are eligible to participate. These problems were noted in the Jurisdictional Statement of Otis R. Bowen. *See* Jurisdictional Statement of Otis R. Bowen, Case No. 87-431, at 14.

III.

IMPLEMENTATION OF ESTABLISHMENT CLAUSE POLICY WILL REQUIRE EITHER A MORE RELAXED ESTABLISHMENT CLAUSE ANALYSIS OR ELIMINATION OF ALL GOVERNMENT PROGRAMS PROVIDING FUNDING ON SEXUAL MATTERS.

Clearly the district court's decision failed to implement the Establishment Clause in the spirit of its underlying policy of protecting individual freedom of conscience. Fidelity to the Establishment Clause and its underlying policy requires this Court to choose either one of two alternative approaches to this case.

The first of these approaches may prove the most workable: the adoption of a more relaxed approach to Establishment Clause cases. Previous discussion has demonstrated that the district court's application of its version of a rigid Establishment Clause test failed to conform to the Establishment Clause's central policy of preservation of individual conscience through the prevention of governmental orthodoxy on religiously charged issues. An alternative would be for this Court to take a more relaxed approach to Establishment Clause cases in general, including this one. If this Court were to take such an approach, many of the absurdities of the type of analysis undertaken by district court would disappear.

This type of relaxed approach finds legal foundation in several of this Court's recent precedents. For example, in *Mueller v. Allen*, 463 U.S. 388 (1983) and *Witters v. Washington Department of Services for the Blind*, 106 S. Ct. 748 (1986), this Court determined that programs open to all withstood Establishment Clause scrutiny even if portions of appropriated funds went to religious entities. This type of construction appear truer to the Establishment Clause's policy of preventing government supported religious orthodoxy than the more rigid approach to the Establishment Clause found in many of the parochial school aid cases and improperly ap-

plied in this case.[3]

Under this approach, government funding could be understood as analogous to a forum government creates, opens to all, and thereafter is unable to exclude participants on religious grounds. Cf. *Widmar v. Vincent*, 454 U.S. 263 (1981) (state may not exclude student religious groups from utilization of meeting facilities available to other student groups based upon the religious content of the groups' speech). Establishment Clause policies would be implemented in several ways. No individual or institution would be required to alter religious affiliations or beliefs to participate in the involved program. A cross-section of religious and non-religious participants would participate, since religious factors would not justify any groups inclusion or exclusion. Government supported orthodoxy would be prevented since a diversity of perspectives would be furnished which would be unavailable if religious groups were either the exclusive bodies funded or, as the district court decreed, excluded from funding entirely. Establishment Clause problems would also be avoided because neither religious nor non-religious groups would be specifically required to be included in the program. *Compare Edwards v. Aguillard*, 107 S. Ct. 2573, 2581-2582 (1987) (state action requiring that teaching conform to specific religious position found inappropriate).

While the alternative just outlined appears the most sensible approach to this case, amici also recognize that this court may desire to follow a more rigid approach to preventing government sponsored orthodoxy on religiously charged issues. However, such an approach would require a complete prohibition of any government funding for programs dealing with teenage sexuality.

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[3] Indeed, the central philosophical foundation of the parochial school aid cases is extremely flimsy. For example, Justice O'Connor's dissent in *Aguilar v. Felton*, 473 U.S. 402, 427-429 (1985) (O'Connor, J., dissenting), convincingly demonstrates the fallaciousness of the major assumptions of the analysis used in many of the restrictive parochial school aid cases: the likelihood that teachers paid in such programs will attempt to advance religion and the entangling effects of any state monitoring of the teacher's performance.

As was seen previously, elimination of theistically oriented participants from funding under a teenage sexuality program otherwise open to all does not prevent government sponsored orthodoxy on these questions. Instead, it actually promotes such an orthodoxy. If questions of sexuality, pregnancy, contraception and abortion are religiously charged, as the district court has apparently decided, the elimination of government sponsored orthodoxy on these issues would demand that government be completely forbidden from financing programs for funding private groups in these areas.

This result is not necessarily a bad one. As this court recognized in *Barnette*, 319 U.S. at 636-637:

> Government of limited power need not be anemic government. Assurance that rights are secured tends to diminish fear and jealousy of strong government, and by making us feel safe to live under it makes for its better support. . . . To enforce those rights today is not to choose weak government over strong government. It is only to adhere as a means of strength to individual freedom of mind in preference to officially disciplined uniformity for which history indicates a disappointing and disasterous end.

The elimination of massive governmentally financed sexuality programs would allow these programs to be completely financed by the private sector. In the private sector, financing of programs dealing with teenage sexuality would be governed by individual decisions of conscience directing support to either theistic or non-theistic approaches to these questions. Accordingly, elimination of all governmentally supported grant programs in the area of teenage sexuality would certainly assure the absence of government supported orthodoxy and preservation of the rights of individual conscience.

Both rigid and flexible approaches to the Establishment Clause appear to have the potential of implementing that Clause's important central policy of preservation of individual

freedom of conscience through prevention of governmentally supported orthodoxy on religiously charged issues of sexuality. The district court's elimination of the participation of theistically oriented religious groups in AFLA programs conforms to neither of these approaches. Instead, it worsens the problem of governmentally supported orthodoxy, which is at the heart of the Establishment Clause's concerns, by eliminating the utilization of any theistic approach to issues it believes many find religiously significant. Since government may not place itself in a position either aiding or opposing religion, this Court must choose either a relaxed Establishment Clause test which prevents orthodoxy through non-discriminatory participation of individuals from all religious perspectives or choose a rigid Establishment Clause test which prevents any hint of governmentally sponsored orthodoxy by eliminating all government programs related to adolescent sexuality.

CONCLUSION

The decision of the district court should be reversed.

Respectfully submitted,

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